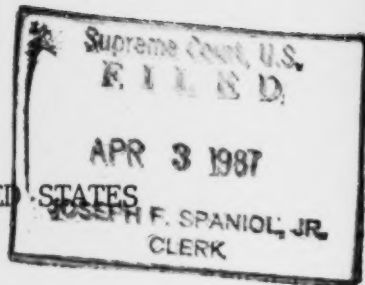


86 1594

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986



LEANDER MAX SMALL,

PETITIONER,

VS.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT

PETITIONER'S APPLICATION FOR
WRIT OF CERTIORARI

BENTON L. BECKER
PETER A. COLLINS
Counsel for Petitioner
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Coral Gables, Florida 33146
(305) 662-4099

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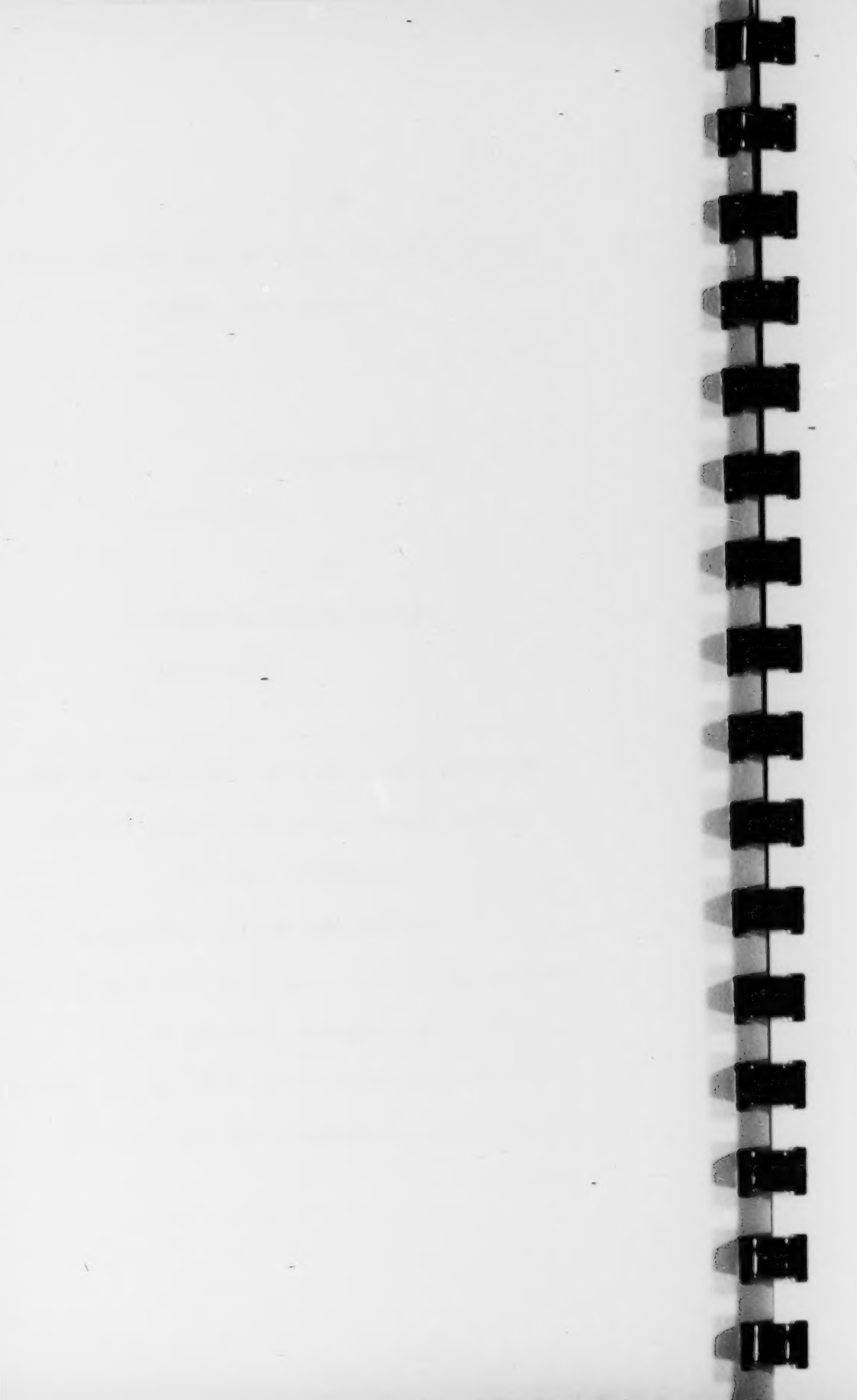
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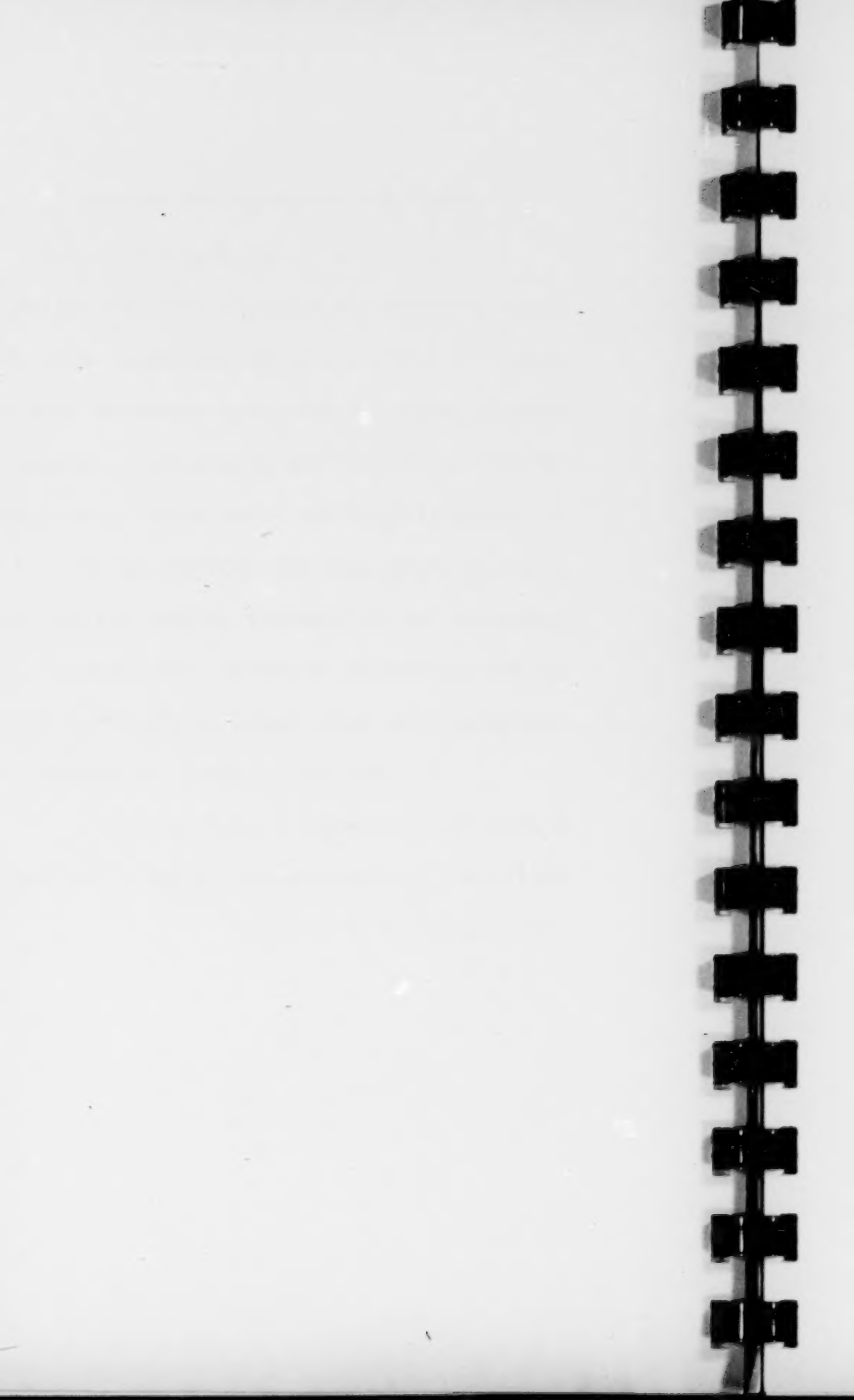
Leander Max Small, petitioner
herein, prays that a writ of certiorari issue
to review the judgment entered in this
criminal case on March 4, 1987 by the United
States Court of Appeals for the Eleventh
Circuit.



QUESTIONS PRESENTED FOR REVIEW

1. Is a United States District Court powerless to take any remedial action under the Fifth and Sixth Amendment under the Court's general supervisory authority upon a determination that the prosecutor's refusal to extend through the trial stage a previous grant of grand jury use immunity to an essential and exculpatory defense witness was solely calculated to prevent the witness' testimony from being heard by the trial jury?

2. Was the evidence introduced during the government's case-in-chief sufficient to overcome Petitioner's Motions for Judgment of Acquittal?

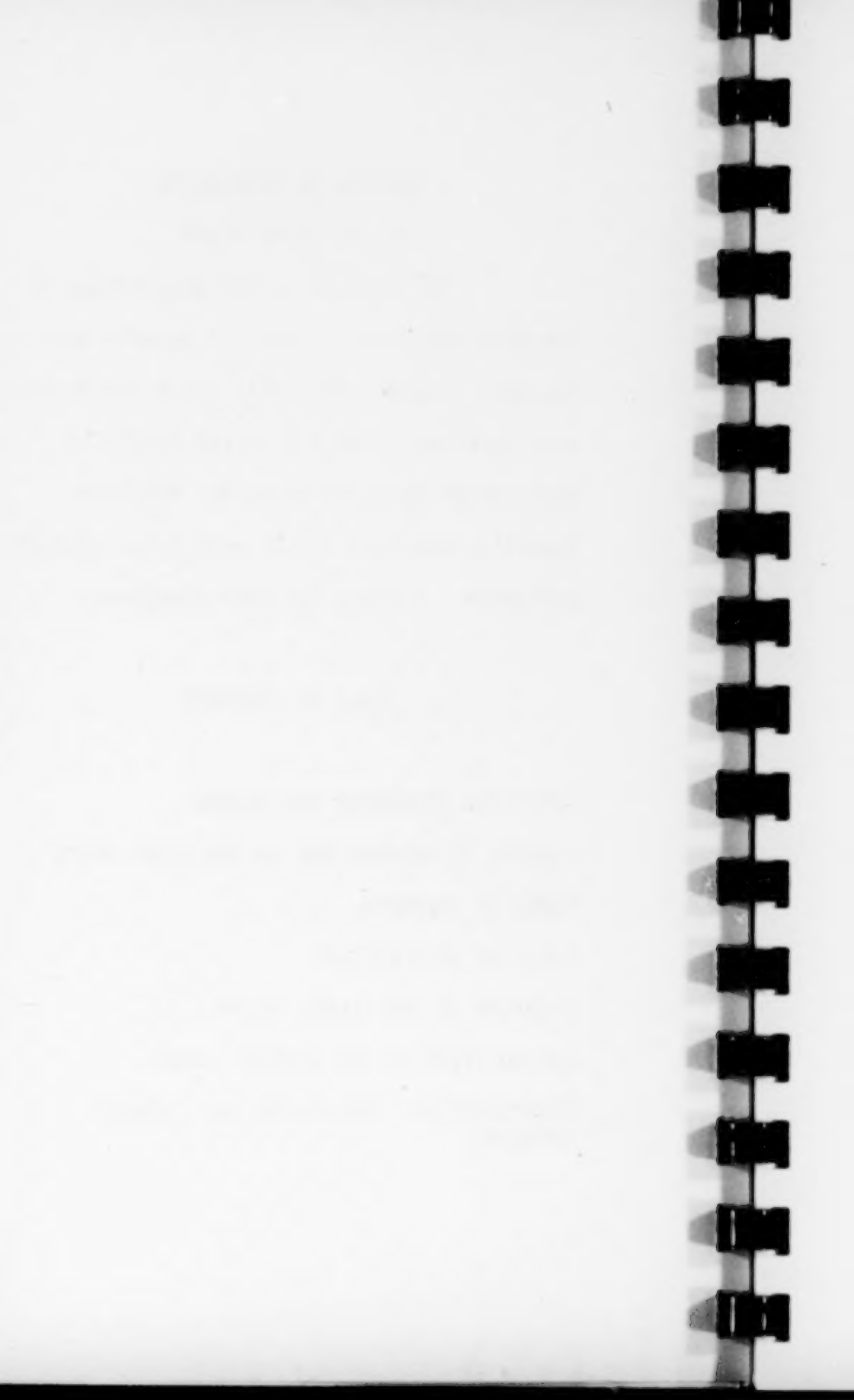


PARTIES TO PROCEEDING
IN THE COURT BELOW

The parties to the proceedings in the Eleventh Circuit Court of Appeals were as follows: Leander Max Small and W. Ed Herder were Appellants and the United States of America was Appellee (Case No. 85-6012). Separate Appellate Briefs were filed through independent counsel for each Appellant.

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18 U.S.C. §6002.	18, 12a
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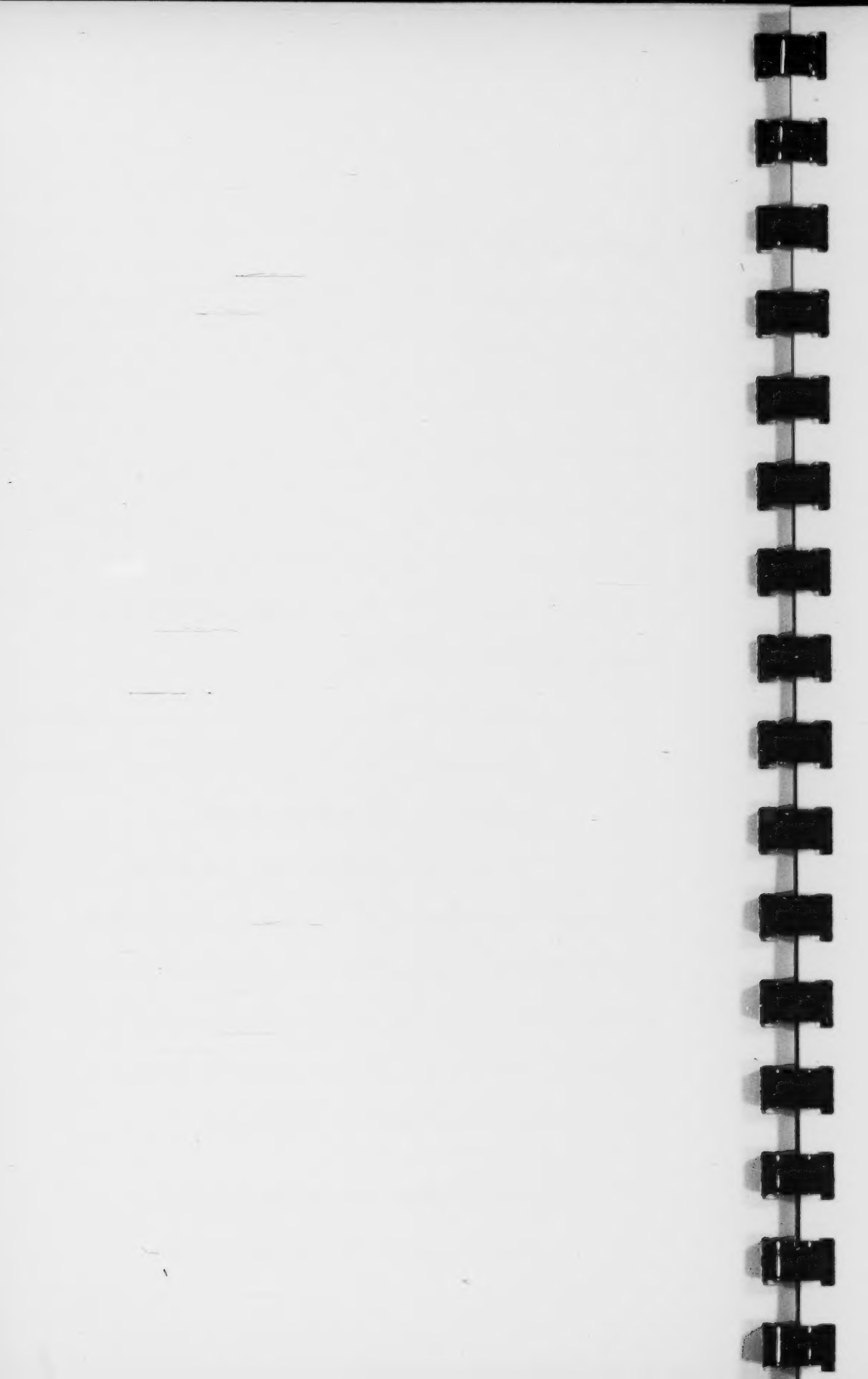
Amendment V.	passim, 10a
Amendment VI	passim, 10a

OPINIONS OF THE COURTS BELOW

No written opinion was issued by the three judge panel or by the en banc panel of the United States Court of Appeals for the Eleventh Circuit. No written opinion was issued by the United States District Court for the Southern District of Florida.

JURISDICTION OF THE SUPREME COURT

The judgment of the United States



Court of Appeals for the Eleventh Circuit was entered on August 4, 1986. Petitioner's timely filing of a petition to the Eleventh Circuit for rehearing with a suggestion for rehearing en banc was denied on March 4, 1987. Title 28, United States Code, Section 1254(1) and Rule 22(2) of the United States Supreme Court Rules confer jurisdiction on this Court to review the judgment in question by a writ of certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES
INVOLVED

UNITED STATES CONSTITUTION:

Fifth Amendment

Sixth Amendment

STATUTES:

18 U.S.C. § 1341

18 U.S.C. § 6002

18 U.S.C. § 6003

STATEMENT OF THE CASE

INTRODUCTION

The United States Court of Appeals for the Eleventh Circuit, in the context of affirming Petitioner's conviction, perpetuated an earlier 1984 ruling which served to further delay the issuance of any definitive judicial ruling quantifying what circumstances constitute government abuse of the immunity process, and should such circumstances be found, what action a trial court may take to correct or to nullify such abuse. By again declining in 1986 to speak to this issue, the Eleventh Circuit insured further years of uncertainty to this issue for the Circuit's bar and bench. The question remains unanswered, i.e. Whether a District Court, discerning governmental abuse to the immunity process, may undertake any remedial act? By affirming Petitioner's



conviction, the Eleventh Circuit also perpetuated the continuation of a now seven year-old conflict among the federal Circuit Courts of Appeals on the question of a District Court's inherent authority to judicially fashion immunity upon a witness. For the past seven years, while federal prosecutive use of the immunization statute has multiplied in each succeeding year, the law in the Third Circuit Court of Appeals has been at direct odds with the law of the Seventh, Eighth and District of Columbia Circuits.

The Third Circuit ruled in 1980 that, under narrow limited circumstances such judicial authority and remedies exist. The Seventh, Eighth and District of Columbia Circuits have asserted that judicial grants of immunity are simply unavailable. The Fifth Circuit, and the Eleventh adopting the



decisional law of the Fifth, chose in 1984, and by its silence in this action, to neither deny the existance of such judicial authority nor to affirm its existence. Rather, it has declined to pronounce any definitive view on the subject.

Such is, and has been, the confusing state of the law on judicial authority to act, after discerning the presence of governmental abuse to the immunity process. The state of the law is that a defendant tried in a federal criminal proceedings in Philadelphia and Newark (and elsewhere in the Third Circuit) is vested with greater constitutional protections respecting his right to immunize defense witnesses, than are his fellow citizens criminally charged in a federal court in Washington, D.C. or St. Louis or Chicago. Similarly, Federal District Court Judges



presiding over Philadelphia criminal proceedings have greater judicial authority than do their brethren in Washington, D.C. Such Philadelphia and Newark jurists and criminal defendants may (or may not; the Courts have not advised) have greater authority than their Miami, Atlanta or Dallas counterparts.

On the two-hundreth anniversary of our nation's rejection of the secular Articles of Confederation, we note that the right of an individual to bring about a judicial immunization of a defense witness is measured in geographic terms.

ESSENTIAL FACTS

In the fall of 1982 numerous individuals throughout the country received letters and questionnaires from two corporations known as the United States Testing Authority (USTA) or American Testing

Institute (ATI). The questionnaires sought responses relative to the recipients television viewing habits and promised the recipient a gift for their responses. No money was specifically solicited from the recipient, although \$14.80 was requested "to defer the costs of shipping, handling and processing."

USTA was devised, created and established through the joint efforts of Petitioner's co-defendant below Ed Herder and Herder's partner Peter Gayle, who received use immunity from the government at the grand jury stage of the proceeding. In 1982, USTA was incorporated in the State of Florida by Peter Gayle and by Francis S. Herder, Ed Herder's mother. The corporate banking account for USTA authorized only Peter Gayle and Ed Herder as signatories. Herder served as General Manager of USTA. Approximately



nine months after USTA had commenced doing business, Ed Herder purchased all of Peter Gayle's USTA interest for \$556,000.00.

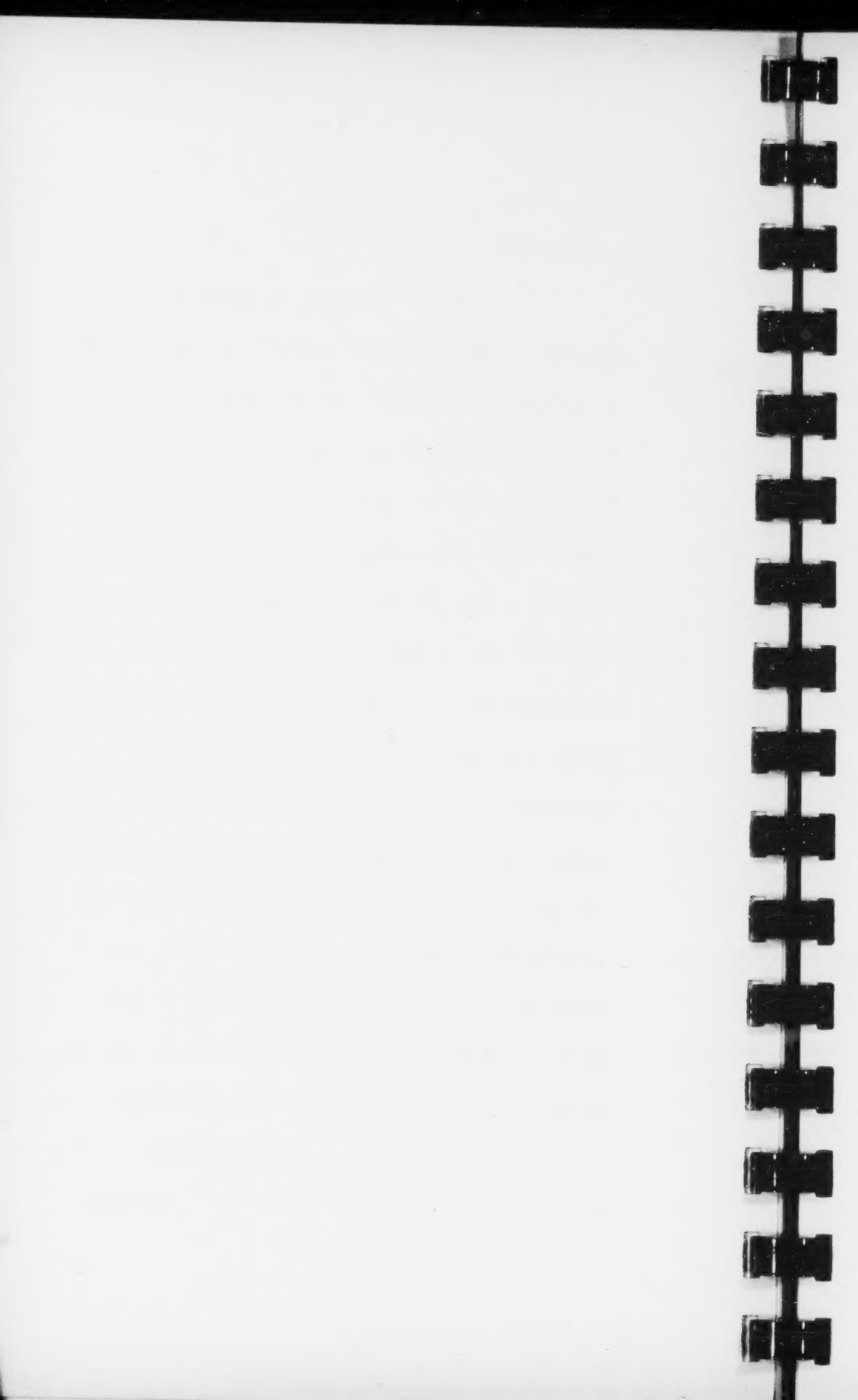
Petitioner Leander Small, not previously involved, was hired and temporarily designated as President of USTA. Small executed no USTA checks.

After Gayle's half million dollar sale of his USTA interest to Herder, USTA changed its operating name to ATI, while continuing to do business in the same manner of USTA. Petitioner Small was neither an officer of ATI, nor did he have signatory authority for any of ATI's checking accounts. Only co-defendant Herder wrote checks and administered the books for ATI. Small functioned as an employee of ATI, whose duties consisted of picking up and delivering mail, responding to complaints and correspondence and supervising office



procedures.

A Postal Service investigation commenced against USTA and ATI in early 1983. On December 27, 1983, in an unusual document drafted by Gayle's counsel, the United States Attorney's Office granted Peter Gayle use immunity at the grand jury stage. The limited scope of Gayle's grant of use immunity was reposed in a written letter addressed to Gayle's counsel, drafted by Gayle's counsel, and executed by the Assistant U.S. Attorney. The immunity letter, granting Gayle use immunity solely at the grand jury stage of the proceeding, purposefully withheld any further immunization beyond the grand jury stage. Gayle's lawyer had fashioned a clever use immunity letter, allowing his client to testify without fear or embarrassment within the secret confines of the grand jury room,



while concurrently authorizing his client to withhold that very testimony from the public (and a petit jury) in a District Court.

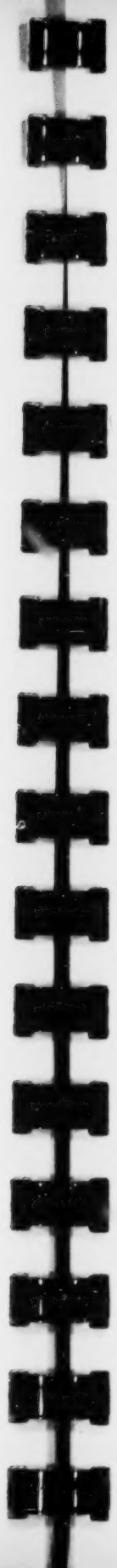
Armed with his grant of use immunity, Gayle testified before the grand jury. Herder and Small were indicted. Gayle was not. Two years later, at the Herder and Small trial, the artful wording of Gayle's December 1983 use immunity letter became critically important.

At trial, the government's evidence focused heavily on co-defendant Herder, noting that Petitioner Small held a mere functionary role in each company. Witnesses confirmed that Petitioner was not in charge of the businesses and that Petitioner did not fix or determine company policy or procedures. Of the nine bank record custodians presented at trial by the government, for the purpose of identifying

the bank records of USTA and ATI, Petitioner had signatory authority on only one account. In that one bank account, notwithstanding Petitioner's signatory authority, the record below reflects that Petitioner never executed any company check.

Petitioner Small subpoenaed the previously immunized Gayle as a trial defense witness. Through counsel Gayle informed the Court that unless Gayle's previous grand jury grant of use immunity was extended through trial, Gayle would invoke his Fifth Amendment privilege and decline to testify. Although almost two years had passed since Gayle's initial grand jury immunization, without an indictment returned or sought against Gayle, nevertheless the government's counsel adamantly refused to extend Gayle's immunity through trial.

Petitioner Small proffered to the



District Court that if Gayle were to testify, the trial jury would learn that Gayle and Herder (not Small) devised and implemented the USTA scheme, that Gayle (not Small) profited in the amount of \$556,000.00, and that Gayle (not Small) was the author of both the letter and the survey card mailed to the public by USTA. To each of the above proffers, absent Gayle's receipt of the one-half million dollars, Petitioner had been charged in the pending indictment.

Petitioner argued that the government's unwillingness to continue Gayle's immunity through trial was an arbitrary abuse of authority of due process magnitude, since no justifiable reason could be (or was) articulated justifying a denial of the requested use immunity extension through trial. Petitioner Small asked the District Court to order the government to



extend Gayle's immunity through trial, or alternatively, to judicially fashion immunity to Gayle. The Court declined both requests. The Court excused Gayle as a witness. His testimony was never heard and Petitioner Small was convicted.

At trial, at the close of the government's case-in-chief, and later at the close of Petitioner Small's case-in-chief, counsel for Petitioner Small motioned the court for a Judgment of Acquittal. The motion was twice denied. A close review of the trial record demonstrates that, although charged and convicted by the trial jury of these acts, no evidence was presented demonstrating that the Petitioner devised the mail fraud scheme or that the Petitioner ever manifested any specific (or even general) intent to perpetrate a fraud upon third parties. Absent the introduction of



evidences of these particularized elements to the charged Mail Fraud Statute (18 U.S.C. 1341), Petitioner's Motion for Judgment of Acquittal should have been granted.

On November 14, 1985, Petitioner timely noted an appeal of his convictions from the District Court to the Eleventh Circuit Court of Appeals pursuant to 28 U.S.C. §1291

REASONS FOR GRANTING THE WRIT

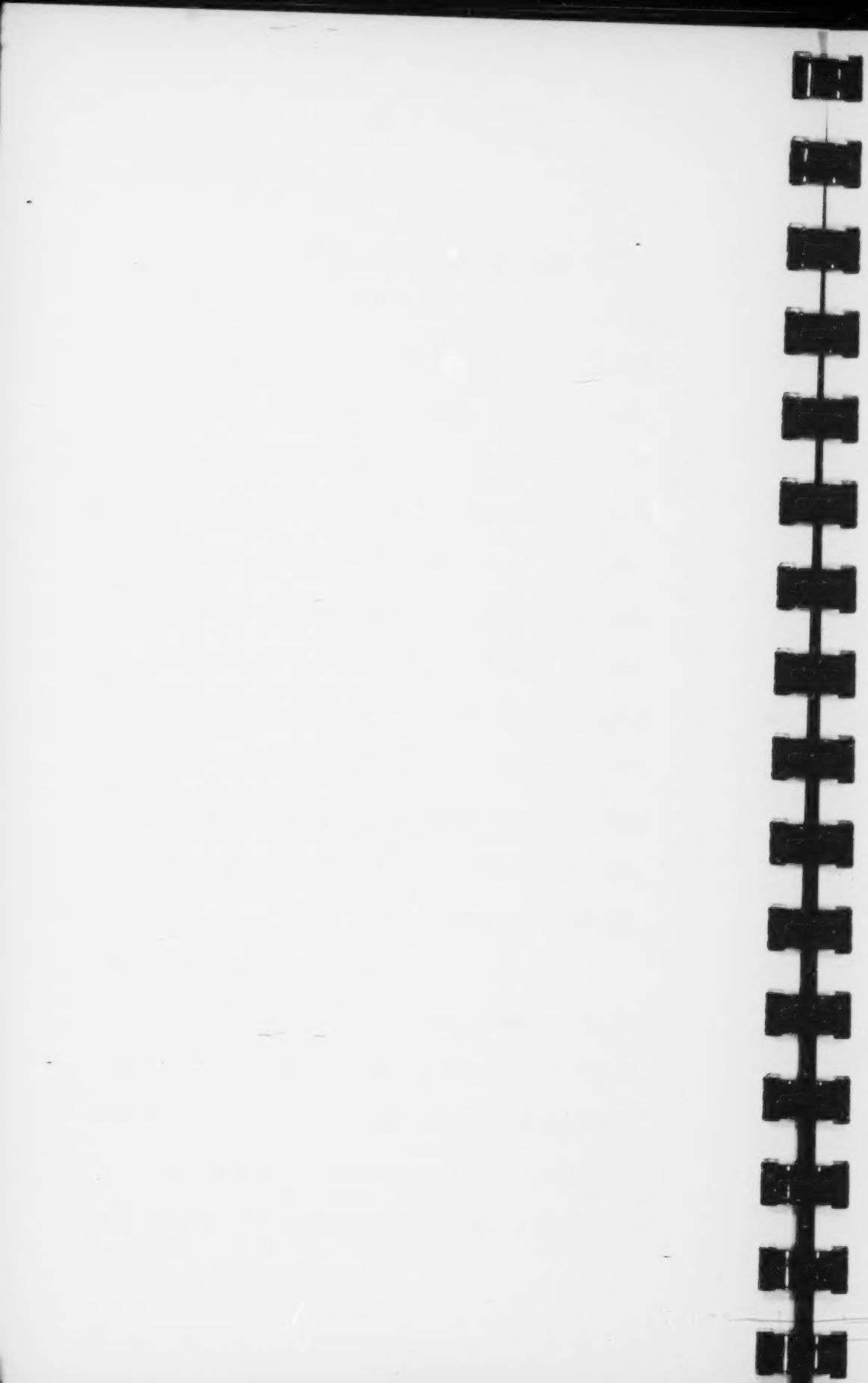
Point 1

In interpreting the scope of Federal Immunity Statute 18 U.S.C. 6002-03, many Courts, including the Seventh, Eighth and District of Columbia Circuits, have restricted the power to grant immunity exclusively to the Executive Branch of the government, confined to the United States Attorney and his superior officers. United States v. Graham, 548 F.2d 1302 (8th Cir.



1977); United States v. Allstate Mortgage Corp., 507 F.2d 492 (7th Cir. 1974), cert. denied, 421 U.S. 999 (1975); In Re: Kilgo, 484 F.2d 1215 (4th Cir. 1973). Other jurisdictions, including the Fifth and the Eleventh Circuit, have equivocated, reserving judgment on the questions of if, and under what circumstances, the judiciary may act. The Third Circuit, however, has taken a broader view of the issue by pronouncing and defining the judiciary's authority to act upon defense immunity request, given a prior judicial finding of government abuse of the immunity process.

In those instances where an abuse of Government conduct has been found to exist, the initial remedy fashioned by the Third Circuit was the issuance of a judicial "request" to the government counsel to immunize a specific witness, or alternatively



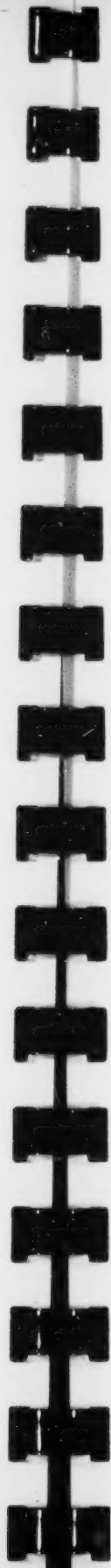
to suffer a judicial dismissal. United States v. Morrison, 535 F.2d 223 (3rd Cir. 1976).

In Morrison, the prosecutor informed a potential defense witness that the witness would suffer prosecution if she were to testify on behalf of Morrison. The prosecutor subpoenaed the witness to his office, where, surrounded by federal agents, the witness was warned of the "dangers" of testifying. Later, when called as a defense witness at trial, rather than testifying as expected, the witness invoked her Fifth Amendment privilege. Morrison was convicted. Through the prosecutor's affirmative abusive process, the government had silenced an important defense witness. The Third Circuit held that under certain limited circumstances Due Process considerations demand a grant of immunity to a defendant's witness and, in view of the



governmental abuse to the immunity process, Morrison had been deprived of his Sixth Amendment right to present defense witnesses. The case was remanded with instructions to enter a judgment of acquittal, unless the government granted use immunity to the witness.

Four years after Morrison, the Third Circuit again addressed the issue of immunity to a defense witness in Government of the Virgin Islands v. Smith, 615 F.2d 964 (3rd Cir. 1980). In that action the governmental abuse was a passive act of omission, rather than the affirmative act of commission in Morrison. The government's counsel had arbitrarily and unjustifiably refused to grant immunity to a juvenile whose testimony might have exculpated the three charged defendants. When the United States Attorney was unable to articulate any



justifiable reason for refusing the defense immunity request, the court concluded that the reason was a governmental strategy to deliberately conceal the witness' relevant, and possibly exculpatory, testimony from the jury. Finding such refusal to be arbitrary and tantamount to a distortion of the fact-finding process, the Court remanded and issued a Morrison type order, i.e. to enter a judgment of acquittal, unless the government granted use immunity to the defense witness.

The Government of Virgin Islands opinion found support in its cited Supreme Court opinion of Chambers v. Mississippi, 410 U.S. 284 (1973). In Chambers, the Supreme Court held that the individual's due process right to present an effective defense had been violated by Mississippi's evidence rules prohibiting a party from impeaching its own witness and against the introduction of



hearsay testimony to prevent disclosures of other informal admissions of a witness' guilt. These "mechanistic" rules of evidence "defeated the ends of justice" by preventing charged party's from introducing exculpatory evidence on their behalf.

As we noted in Herman, Chambers vs. Mississippi, 410 U.S. 284 (1973), albeit in a context different than immunity, furnishes strong support for the holding that immunity may be required for a defense witness if realistic meaning is to be given to a defendant's due process right to have exculpatory evidence presented to the jury. Smith at 970.

The Fifth Circuit has traditionally taken a more neutral view of the immunity question. United States v. Herbst, 641 F.2d 1161 (5th Cir. 1981), cert. denied, 454 U.S. 851 (1981), United States v. D'apice, 664 F.2d 75 (5th Cir. 1981) and United States v. Thevis, 665 F.2d 616 (5th Cir. 1982), cert.



den., 456 U.S. 1008, 1982. Based on the controlling Fifth Circuit precedent in United States v. Thevis, 665 F.2d 616 (5th Cir. Unit B 1982) Cert. Den., 456 U.S. 1008, 1982, the Eleventh Circuit held in United States v. Gottesman, 724 F.2d 1517 (11th Cir.1984) reh. den. 729 F.2d 1468 (1984) that a District court may not grant immunity to a defense witness, simply because of a claim that the witness possesses essential exculpatory information allegedly unavailable from other sources. Nonetheless, Gottesman conceded that a compelling argument could be presented for judicial grants of immunity where prosecutorial misconduct was evident in the granting or denying of use immunity. The issues remain unresolved, for the Eleventh Circuit has refused to state: (1) Exactly what circumstances constitute government abuse of the immunity process, and (2)



Whether a District Court, discerning the presence of such government abuse, may take any action to nullify such abuse. Gottesman, at page 1524 Footnote 9.

In 1984, when the Eleventh Circuit reviewed Gottesman, it was bound by the 1982 Fifth Circuit decision in Thevis. Consistent with Thevis, the Gottesman Court found no district court error in its refusal to grant Mrs. Gottesman's request to immunize a defense witness. The government's refusal to immunize a defense witness was justified, appropriate, non-abusive and explainable in reasonable terms. The facts disqualifying Gottesman from consideration are legend, including the fact that the defendant sought a judicial immunization order for her own husband, who had previously asserted both the Fifth Amendment Privilege and the marital privilege, and had been convicted earlier of



(and was appealing) the same offense then pending against defendant Mrs. Gottesman. In Gottesman, the reasonableness and justification for the government's refusal to immunize and the total absence of any government abuse of the immunity process contributed toward the view that Gottesman was not the appropriate case to address the issue.

Notwithstanding, at footnote 9, the Gottesman panel acknowledged that "a compelling argument can be made for judicial grants of use immunity in extraordinary cases where prosecutorial misconduct has occurred in the handling of the immunity process." Accordingly since 1984, the issue of judicial grants of immunity has been reserved for later consideration in the Eleventh Circuit.

However, inasmuch as we find no evidence of such misconduct in the present case, we decline to

decide either (1) exactly what circumstances might constitute government abuse of the immunity process, or (2) whether a court may, in fact, grant immunity when it finds government abuse. Gottesman, footnote 9, at 1524.

In Thevis, where it was conceded that no governmental abuse occurred, the defendant sought use immunity judicially imposed upon his father. Thevis at 641. Absent evidence of government abuse to the immunity process, even if one were to assume that the witness "possessed exculpatory information unavailable from other sources," the district court correctly declined to grant immunity. Id at 639. The rare exercise of judicial authority to impose use immunity upon a defense witness should be restrained and made absolutely conditional upon a prior judicial finding of governmental abuse to the immunity process. The opinions of the Eleventh Circuit in Gottesman (and the

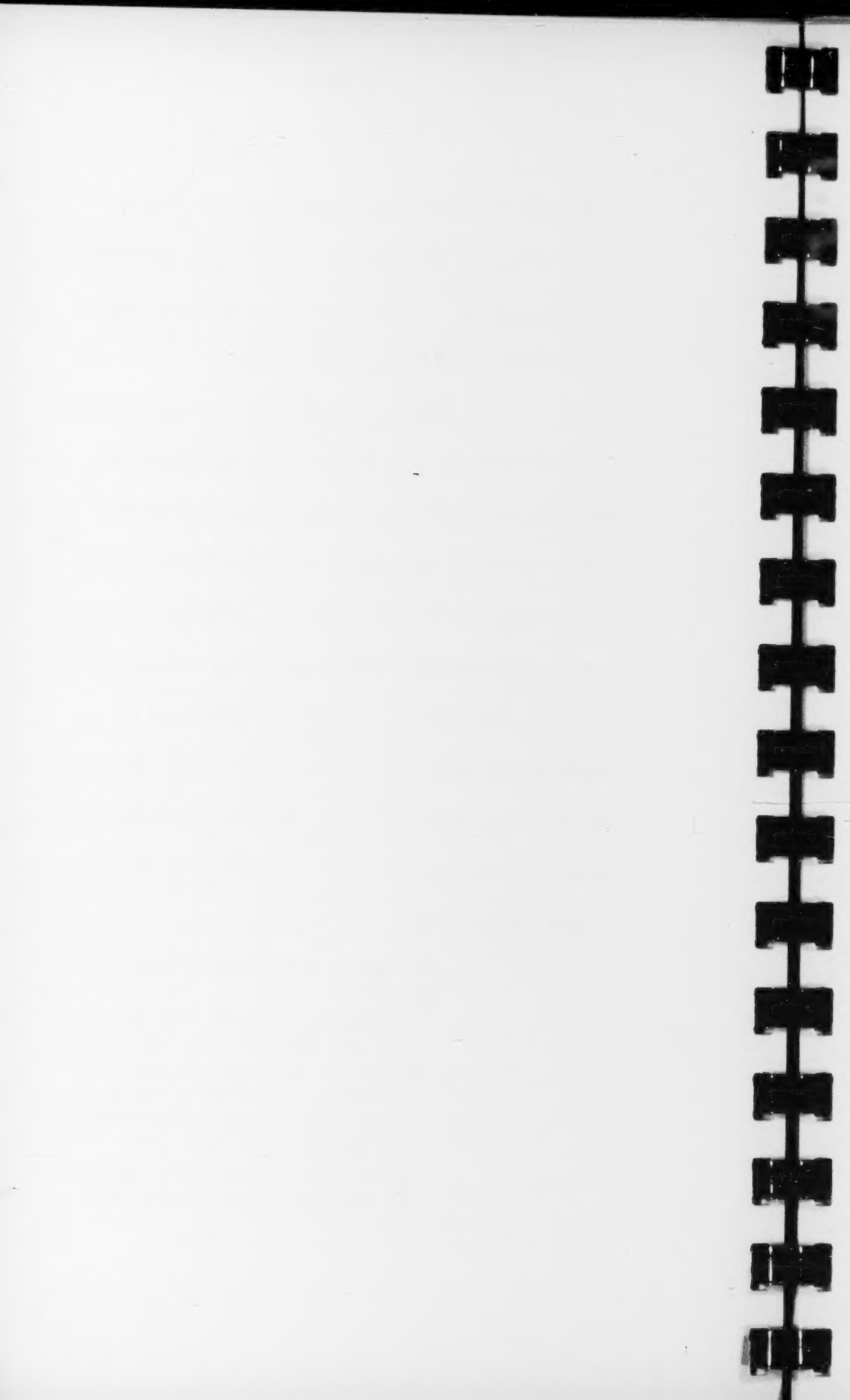


Fifth Circuit's in Thevis) are in direct conflict with the Third District's opinion in Virgin Island. This court recognized that unfortunate conflict since 1984.

In Autry v. McKaskle, 465 U.S. 1085 (1984) Autry filed a petition for Writ Of Certiorari with the United States Supreme Court seeking review of a Texas State Court prosecutor's denial of a use immunity request for a witness described as being necessary to Autry's defense. In Justice Marshall's dissenting opinion denying the writ, joined by Justice Brennan, the "widely divergent" conflict among the federal Circuits on this issue was noted:

3. As the Fifth Circuit has noted:

The Supreme Court has not decided whether courts may grant defense witnesses use immunity, and the circuit courts which have addressed the issue have produced widely divergent opinions. On the question of whether



judicial use immunity is necessary for essential exculpatory testimony, the courts have split three ways. The Third Circuit...held that such immunity is available in certain circumstances. On the other hand, the Seventh, Eighth and district of Columbia Circuits have ruled that such immunity is unavailable...The remaining Circuits which have addressed the issue have denied immunity in specific cases before them, but left open whether immunity would ever be available. United States v. Thevis, 665 F.2d at 639 (footnote omitted). Although the Fifth Circuit has never explicitly determined whether due process may require a trial court to grant a defendant use immunity, its decisions imply that courts lack such power under any circumstances. Id., at 639, n. 25. (Autry at 1088)

It is respectfully submitted that this action is the appropriate case to articulate what circumstances constitute governmental abuse to the immunity process,

and to define the Court's authority to remedy or to neutralize such abuse. In this action, Petitioner did not seek the commencement of immunity de nova for a witness; rather, Petitioner merely sought the continuation through trial of the witness' earlier grant status of use immunity. Petitioner sought no new or favored status for the witness; he sought only to perpetuate a status earlier imposed by the government and to be free to use that status of the witness, just as the government had two years earlier.

When Petitioner's request for a continuation of the witness' prior use immunity was arbitrarily refused by the government, counsel sought an explanation, or some justification, for the refusal. These words were the response of the government's counsel:

However, I think--not as a tactical matter, but a policy



matter--it is very important for the Government in no case to have a defendant's witness be granted immunity, get up, and assume the blame with immunity.

That explanation, even as "a policy matter", makes little sense and has no application in this case. Assuming the non-perjurious nature of Gayle's grand jury testimony, Gayle would have already been "granted immunity (gotten) up, and assume(d) the blame (with Herder) with immunity." Nothing new would have been forthcoming, other than the fact that his admissions and his assumption of blame would be public, and no longer private. Petitioner sought unsuccessfully for a public repetition, of that prior private testimony. The government sought successfully the suppression, not the enlightenment, of that prior private testimony.

Point 2

All crimes are divisible into



separate elements or components. Jurors are prohibited from engaging in conjecture or speculation regarding the presence or absence of evidence or whether an event may or may not have occurred. Jury verdicts are traceable to evidence introduced during the conduct of the trial, not to impulse or unsubstantiated belief. Rule 29(a) of the Federal rules of Criminal Procedure serves as a statutory impediment against jury speculation. The Rule allows Motions for Judgment of Acquittal to be considered by the District Court and, if granted, no adjudication of that matter shall be submitted to the jury. Before the grant or denial of a Motion for Judgment of Acquittal, the District Court must undertake to identify each element of each crime charged, to view the trial evidence in existence at the time the motion is pending in a light most



favorable to the government, together with reasonable inferences which may be drawn from that evidence; and to determine if there has been evidence presented as to each element of the crime charged, of sufficient nature for a reasonable prudent juror to conclude guilt.

Rule 29(a) of the Federal Rules of Criminal Procedure provides that a motion for judgment of acquittal should be granted after the evidence on either side is closed, Cephus v. United States, 324 F.2d 893, (D.C. C.A. 1963); Cartwright v. United States, 335 F.2d 919 (10th Cir. 1964) and that the sole ground upon which a judgment of acquittal should be based is a successful challenge to the sufficiency of the government's evidence. United States v. Rivers, 406 F.Supp. 709 (D.C. Pa. 1975), Aff'd. 544 F.2d 13 (1975). Once raised, the aforestated test to be applied by the trial court in deciding the



motion for acquittal is identical to the test to be applied by a reviewing appellate court. United States v. Nelson, 419 F.2d 1237 (9th Cir. 1969); United States v. Price, 623 F.2d 587 (9th Cir. 1980), cert. denied, 449 U.S. 1016 (1980).

At trial, at the close of the government's case-in-chief, and later at the close of Petitioner Small's case-in-chief, counsel for Petitioner Small motioned the court for a Judgment of Acquittal. The motion was twice denied. A close review of the trial record demonstrates that, although charged and convicted by the trial jury of these acts no evidence was presented demonstrating that the Petitioner devised the mail fraud scheme or that the Petitioner ever manifested any specific (or even general) intent to perpetrate a fraud upon third parties. Absent the introduction of any such



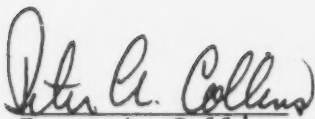
evidences of particularized elements to the charged Mail Fraud Statute (18 U.S.C. 1341), Petitioner's Motion for Judgment of Acquittal should have been granted.

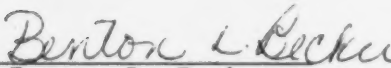
CONCLUSION

For the reasons stated herein, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Benton L. Becker
Peter A. Collins
Counsel for Leander Max Small


Peter A. Collins

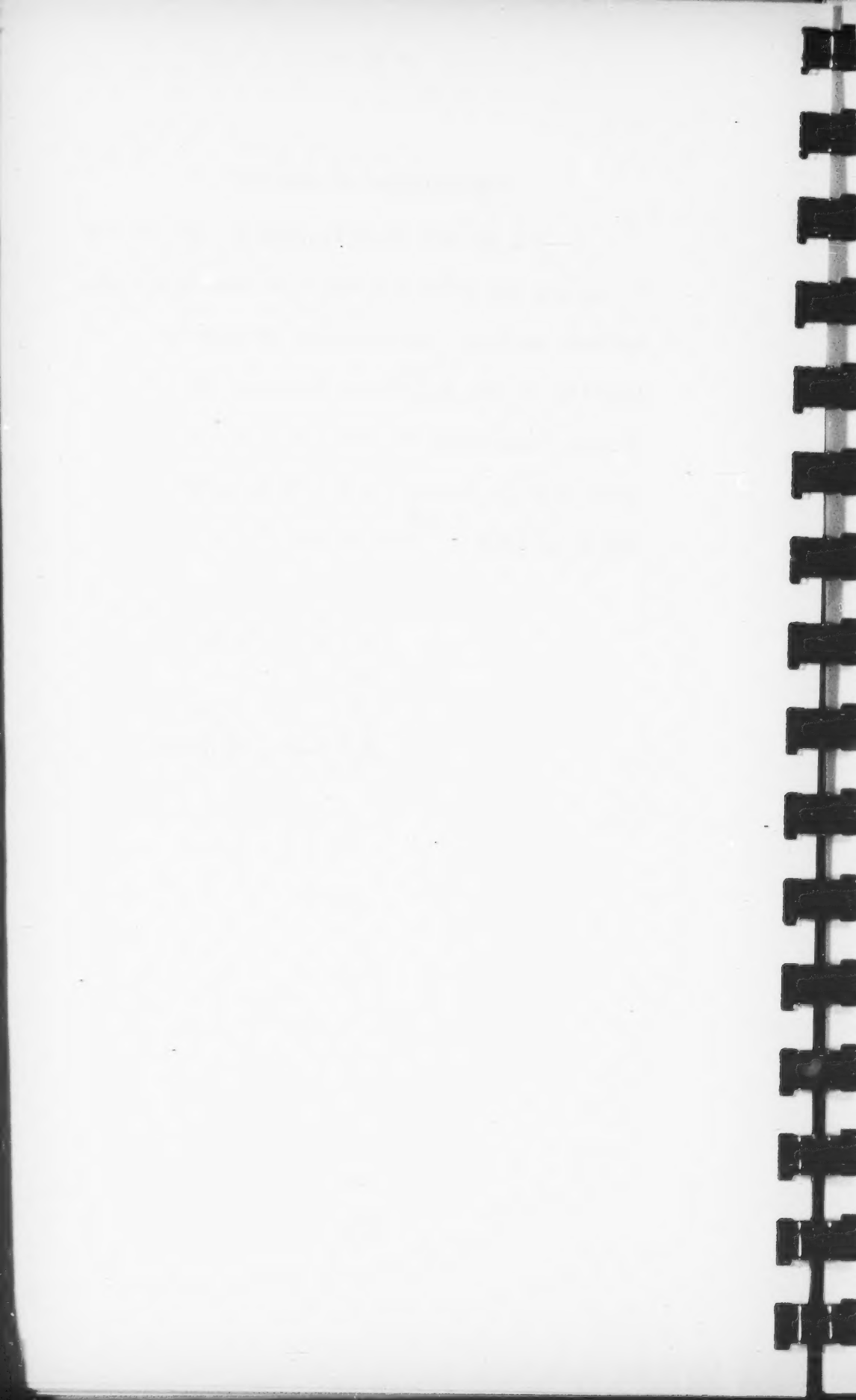

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing petition for Writ of Certiorari was mailed, postage paid, to the Honorable Charles Fried, Solicitor General, United States Department of Justice, 10th and Constitution Avenue, N.W., Washington, D.C. 20530 on this 2nd day of April, 1987.

Benton L. Becker
Benton L. Becker

Peter A. Collins
Peter A. Collins



APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 85-6012
Non-Argument Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

W. ED HERDER,
LEANDER MAX SMALL,

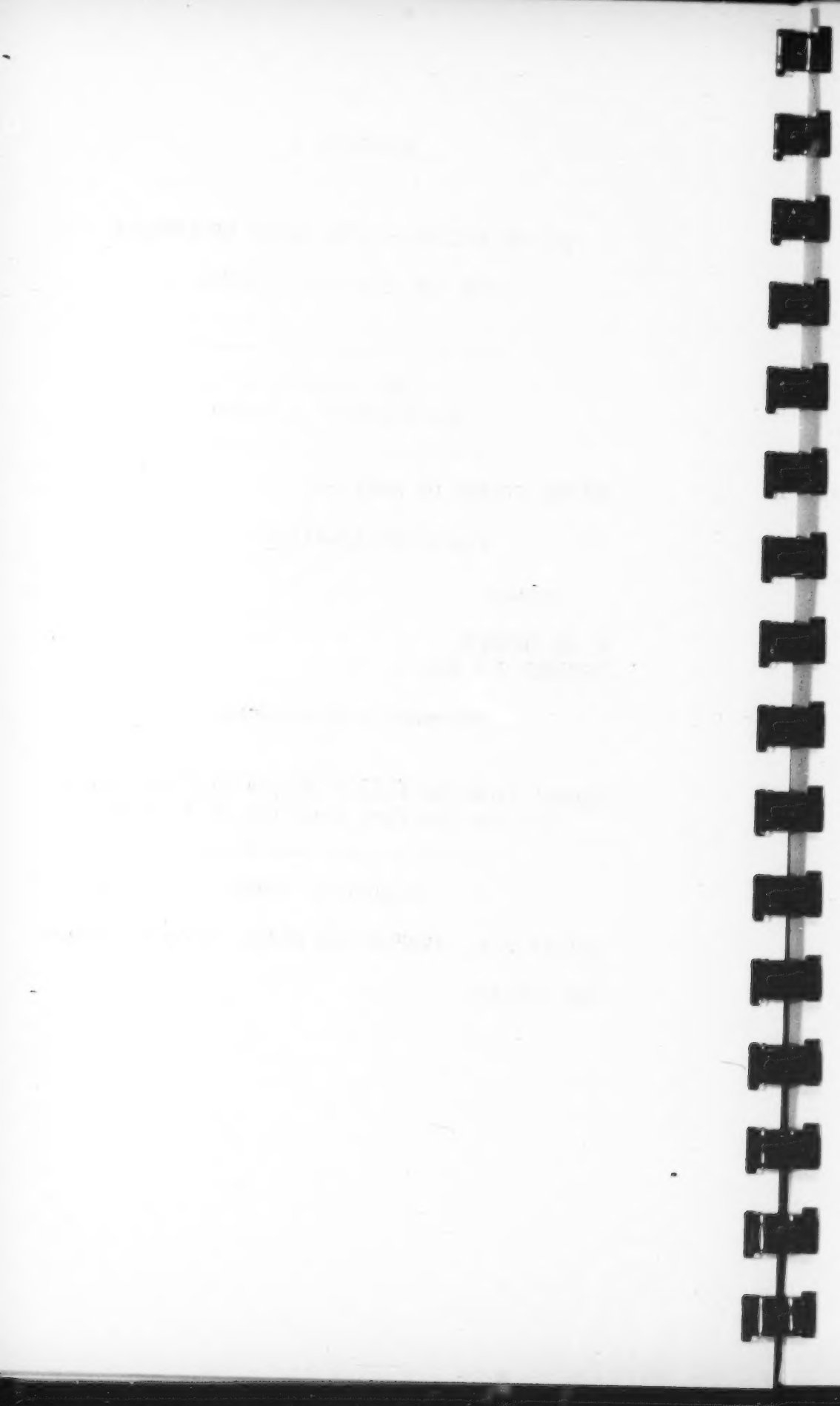
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

(August 4, 1986)

Before FAY, JOHNSON and CLARK, Circuit Judges.

PER CURIAM:



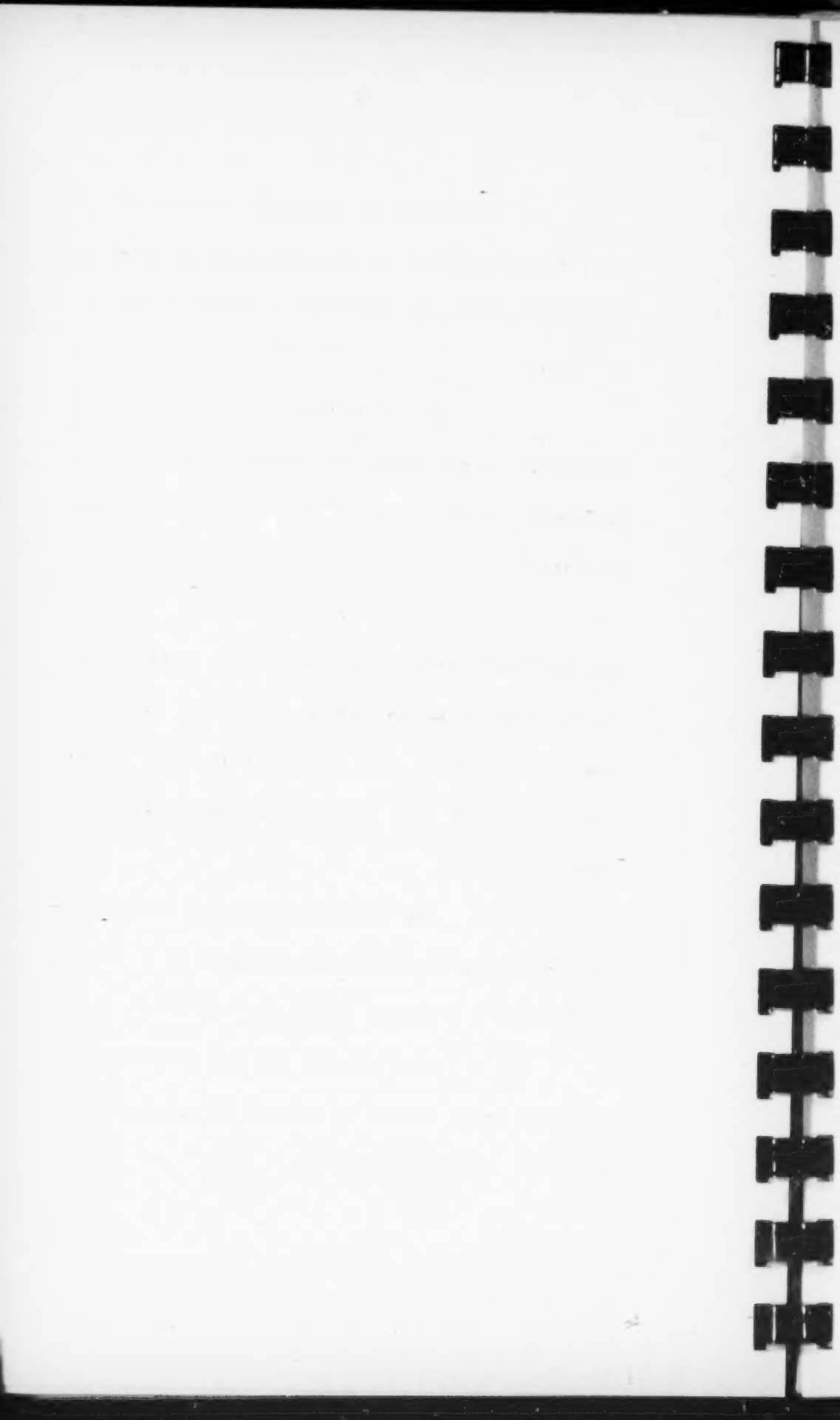
Convicted on multiple counts of mail fraud related to an extensive program of mail solicitation, appellants raise a series of issues:

1. The propriety of consecutive sentences under separate counts brought pursuant to 18 U.S.C. § 1341 as to individual mailings.

2. The correctness of a pre-sentence investigation report reflecting large sums of money received during the operation rather than being limited to those sums received from the victims specified in the indictment.

3. The admissibility of extrinsic evidence dealing with the attempt to influence a witness.

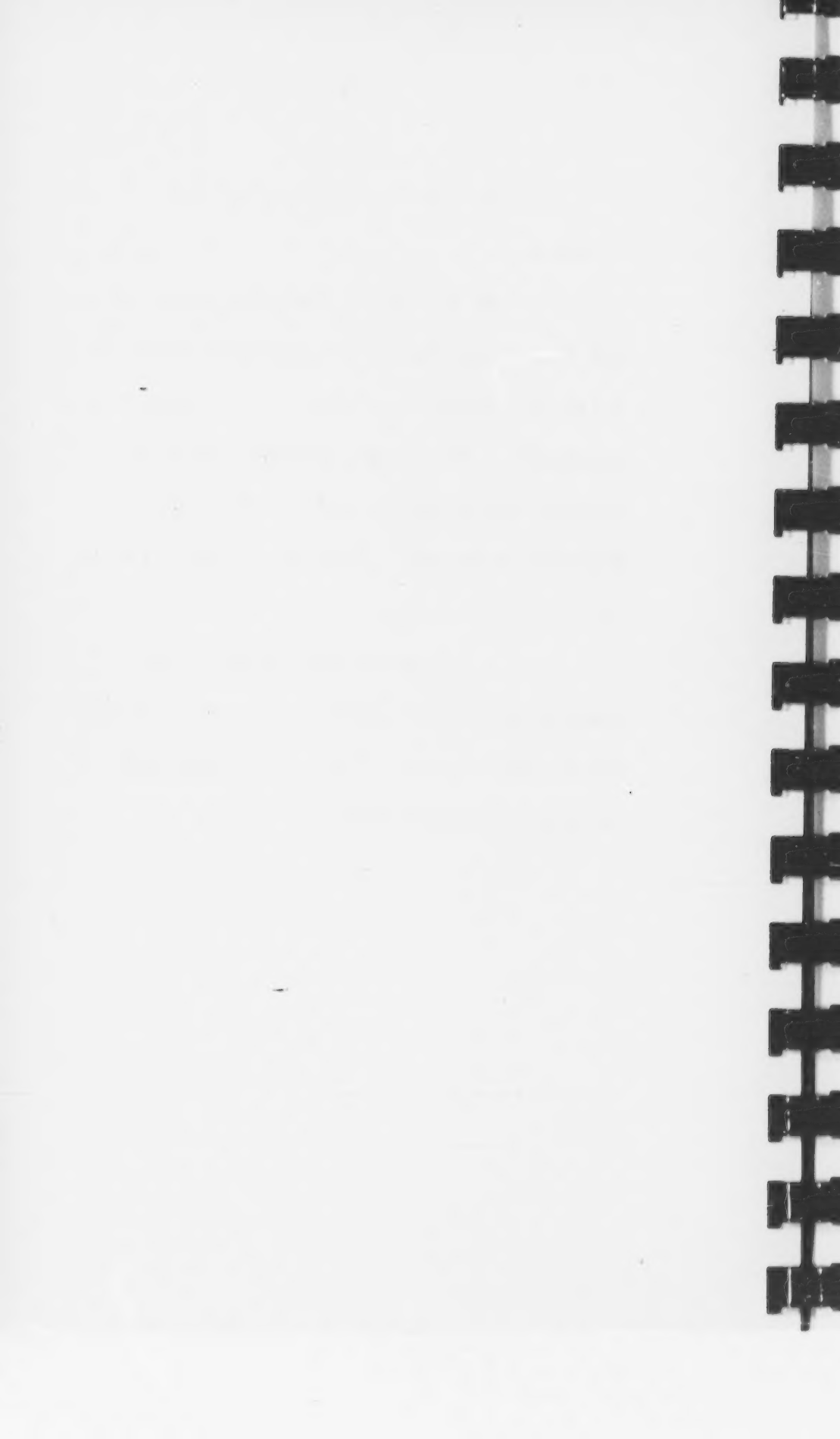
4. The refusal by the government and the trial court to extend immunity to a witness.



5. The sufficiency of the evidence.

As to issues numbered above as one and four, appellants concede that clear existing authorities control and negate their arguments. They urge, however, that we revisit these issues and correct these mistaken holdings. This we are not free to do.

A review of the record also convinces us that there is no merit in the other contentions. The convictions and sentences are AFFIRMED.



APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-6012

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

W. ED HERDER,
LEANDER MAX SMALL,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION FOR REHEARING AND SUGGESTION FOR
REHEARING EN BANC

(Opinion August 4, 11 Cir., 1986, ___ F.2d ___).

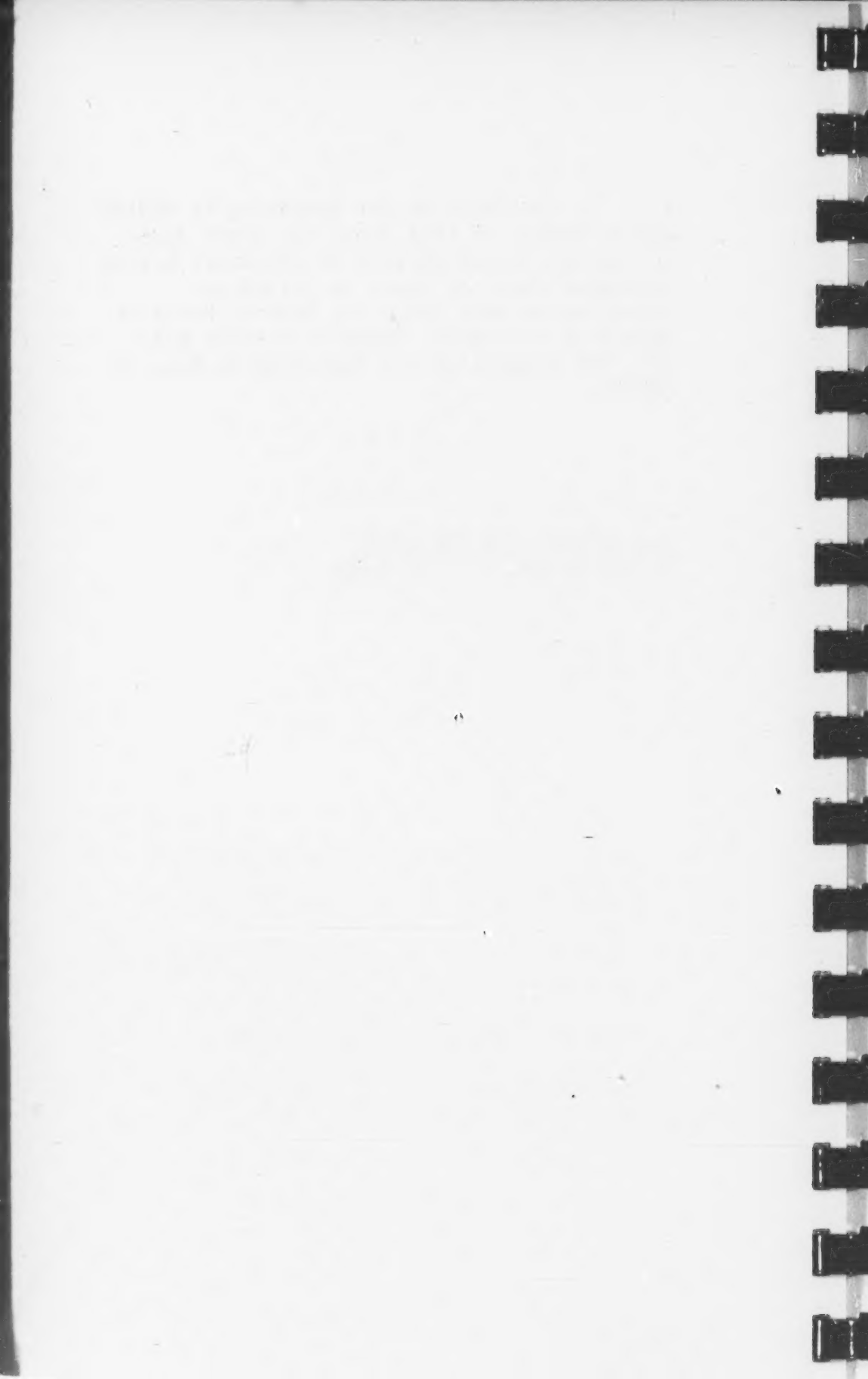
Before FAY, JOHNSON, and CLARK, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

* * * *

/s/ ENTERED FOR THE COURT:
United States Circuit Judge



APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-6012

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

- versus

W. ED HERDER and
LEANDER MAX SMALL,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

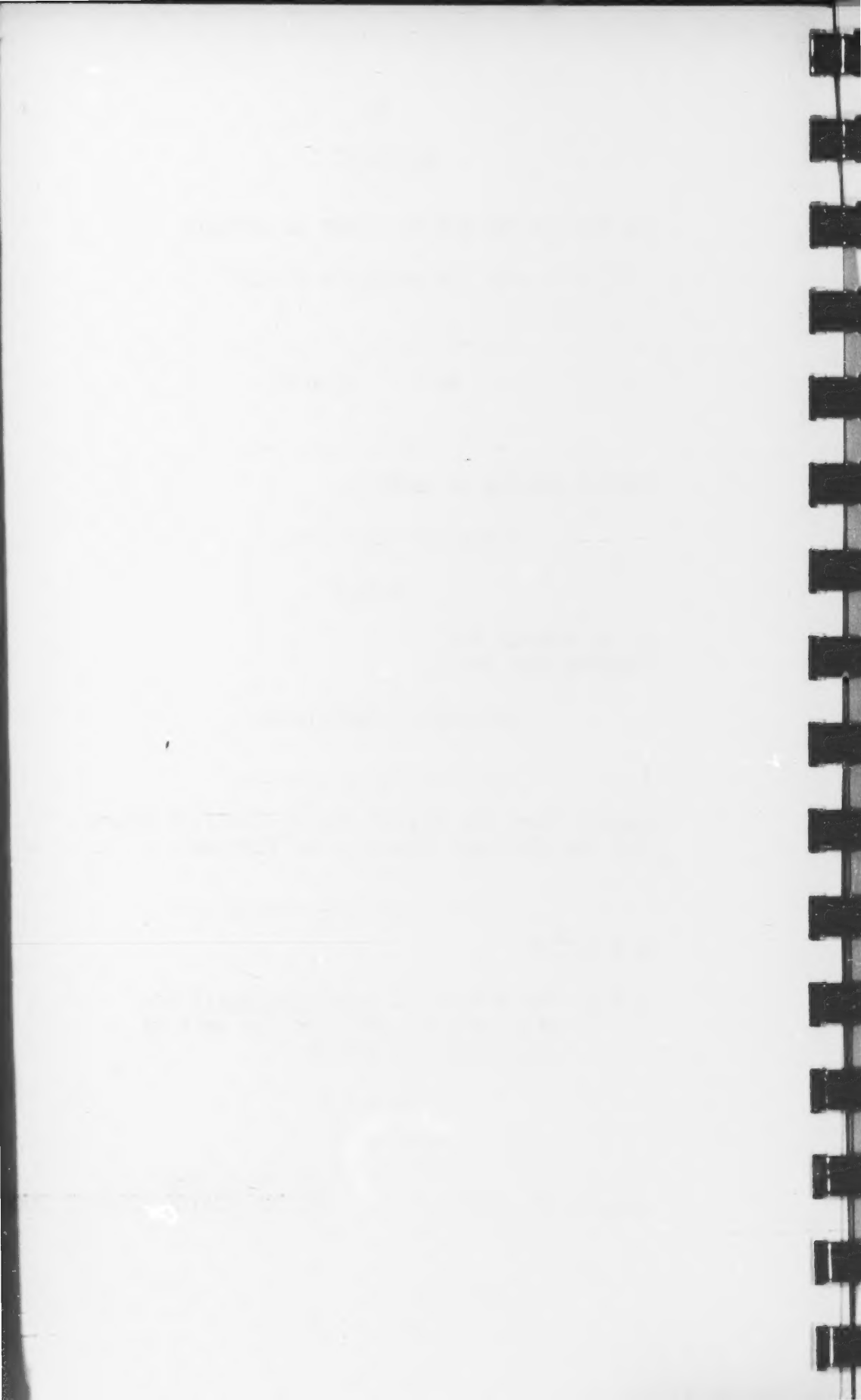
O R D E R :

(X) The motion of appellant Small for
stay pending petition for writ of
certiorari is DENIED.

* * * *

(March 20, 1987)

/s/ Peter Fay
UNITED STATES CIRCUIT JUDGE



APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-6012

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
W. ED HERDER and
LEANDER MAX SMALL,
Defendants-Appellants.

On Appeal from the United States District
Court for the Southern District of Florida

O R D E R:

Appellant Small's motion to remain
on bond pending appeal during application for
writ of certiorari is denied.

(March 20, 1987)

/s/ Peter Fay
UNITED STATES CIRCUIT JUDGE



APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-6012
Non-Argument Calendar

D.C. Docket No. 83-1040

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

W. ED HERDER,
LEANDER MAX SMALL,

Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of Florida

Before FAY, JOHNSON and CLARK, Circuit Judges

J U D G M E N T

This cause came on to be heard on
the transcript of the record from the United
States District Court for the Southern
District of Florida, and was taken under

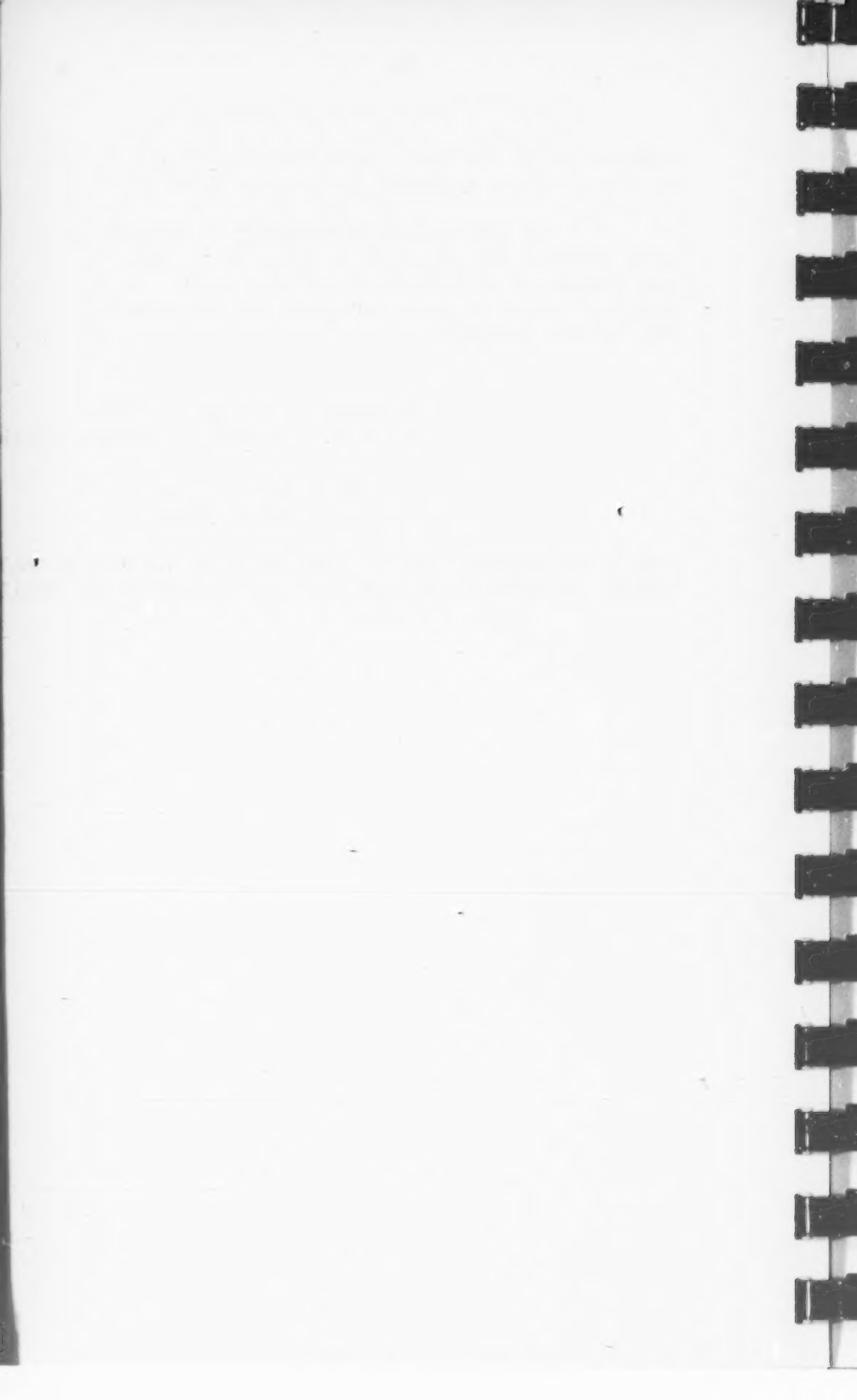
submission by the Court upon the record and
briefs on file, pursuant to Circuit Rule 23;

ON CONSIDERATION WHEREOF, it is now
here ordered and adjudged by this Court that
the judgments of conviction of the said
District Court in this cause be and the same
are hereby AFFIRMED.

Entered: August 4, 1986
For the Court: Miguel J. Cortez, Clerk

By: /s/illegible
Deputy Clerk

ISSUED AS MANDATE: AUG 27 1986 AS TO W. ED HERDER ONLY
ISSUED AS MANDATE: MAR 24 1987 AS TO LEANDER MAX SMALL



APPENDIX F

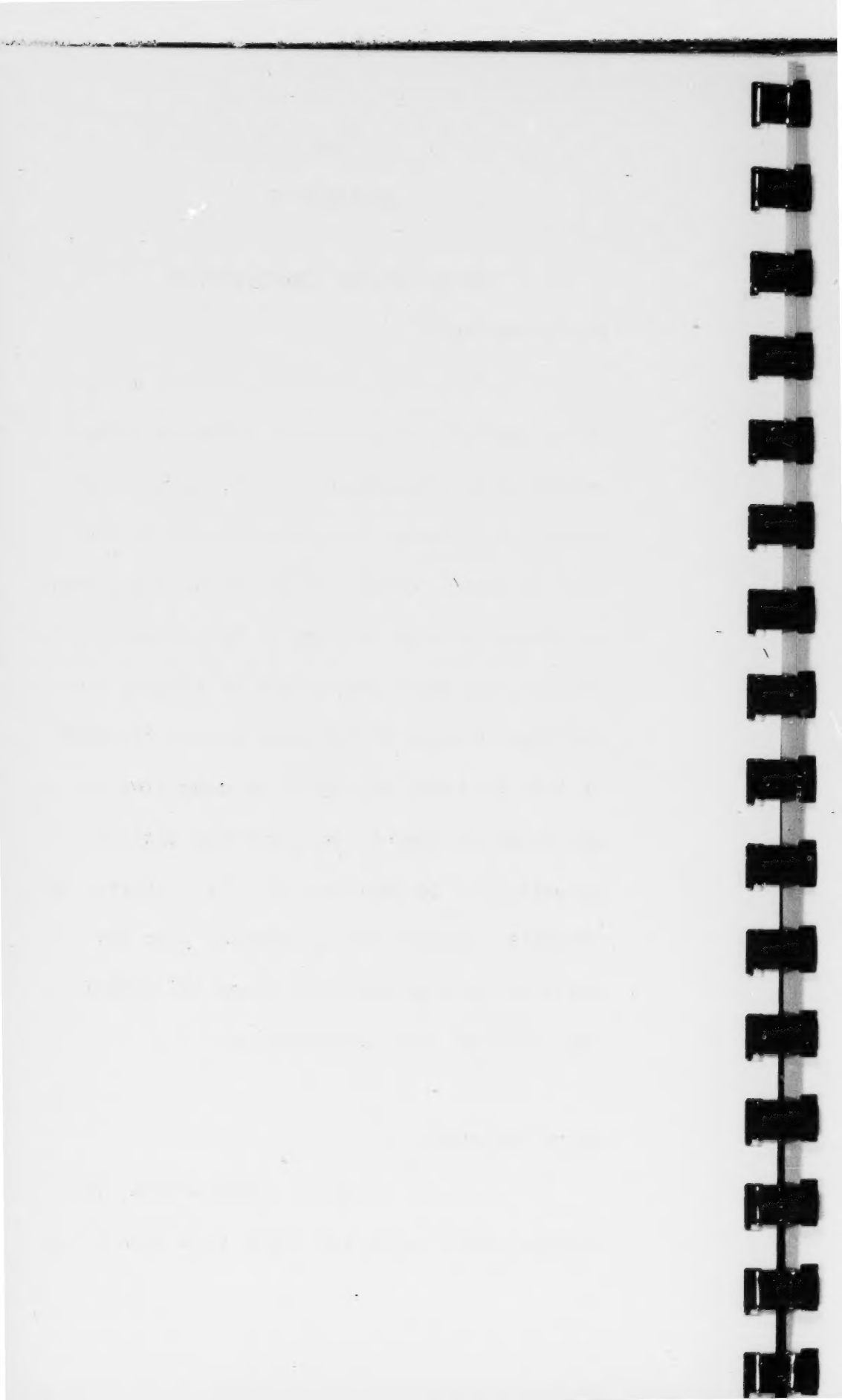
UNITED STATES CONSTITUTION

FIFTH AMENDMENT:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and



public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATUTORY PROVISIONS

18 U.S.C. § 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for



unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than \$1,000 or imprisoned not more than five years, or both.

18 U.S.C. § 6002. Immunity generally

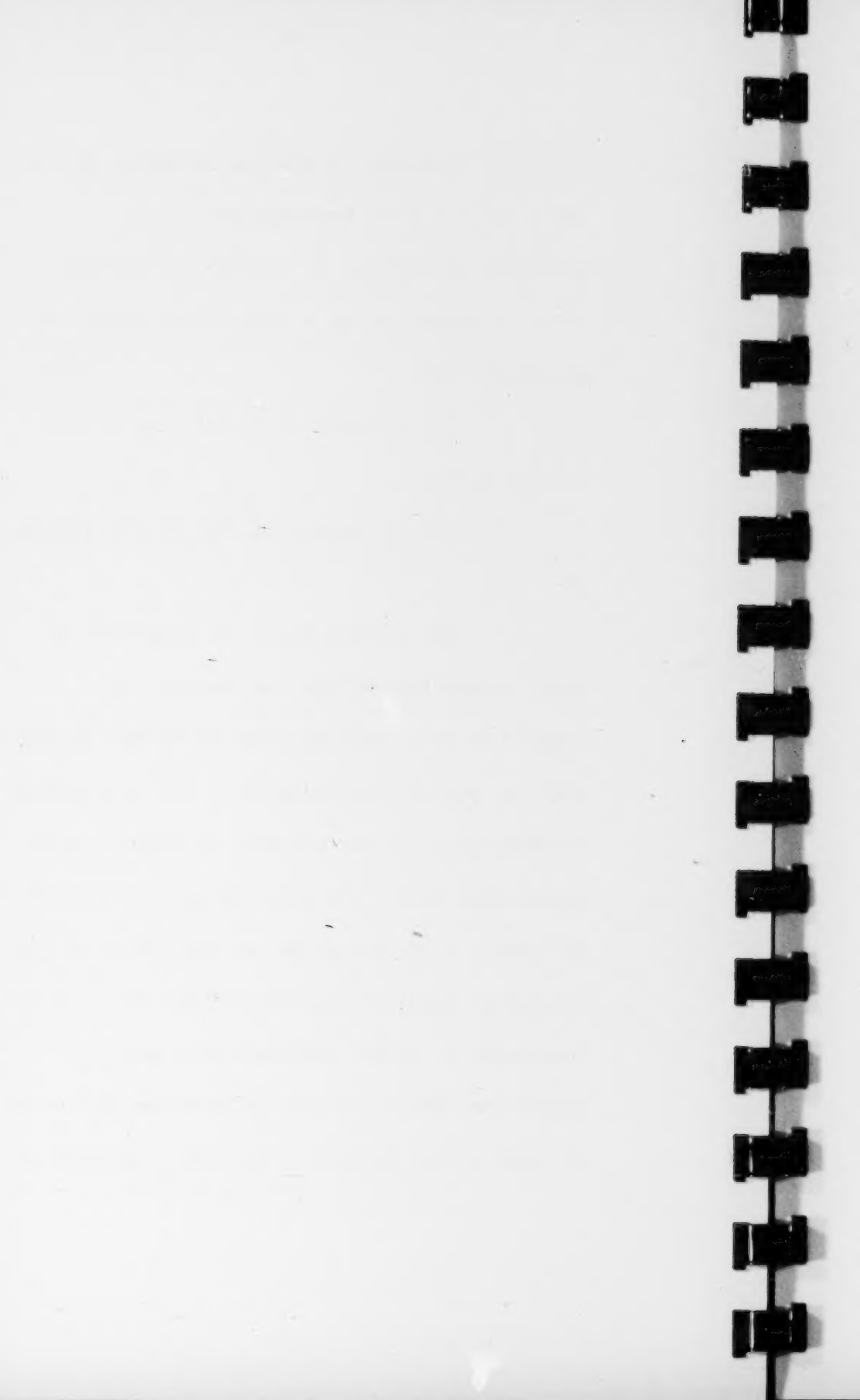


Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to-

(1) a court or grand jury of the United States,

(2) an agency of the United States,
or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House, and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or



other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

18 U.S.C. § 6003. Court and grand jury proceedings

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other



information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment-

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

(12)
No. 86-1594

Supreme Court, U.S.
FILED

MAY 29 1987

JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

LEANDER MAX SMALL, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT**

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1594

LEANDER MAX SMALL, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT*

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that (1) the district court erred when it refused his request to immunize a defense witness, and (2) the evidence was insufficient to support his conviction.

1. Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on 18 counts of mail fraud. He was sentenced to concurrent terms of five years' imprisonment, \$17,000 in fines, and five years' probation. The court of appeals affirmed by unpublished order. Pet. App. A.

In June 1982 petitioner and co-defendant W. Ed Herder operated a mail solicitation business known as United States Testing Authority (USTA).¹ Petitioner and Herder

¹The statement of facts is taken from the government's brief in the court of appeals.

caused USTA to mail hundreds of thousands of solicitations to the general public nationwide, offering a valuable prize free of charge in exchange for returning a survey card on television viewing habits and a \$14.80 handling fee. Contrary to the representation made in the literature sent to the public, USTA had no client for its survey. Moreover, the "prize" awarded to 9,999 of every 10,000 individuals who responded to the solicitation was merely a membership in a financially unsuccessful film processing club owned by petitioner and Herder. One in 10,000 persons received one of the prizes listed in the solicitation that had a minimal value.

Concerned that no use was being made of the information furnished by those who responded to USTA's survey, petitioner prevailed upon Herder to commission a survey of the responses. The survey was not completed, in part because petitioner and Herder stopped paying for the services of the individual they had retained to analyze the responses.

The scheme led to an investigation by the United States Postal Service and an order issued by postal authorities ceasing delivery of mail to USTA. As a consequence, in September 1982 USTA closed its business. At the same time petitioner and Herder established a successor to USTA, which they called American Testing Institute (ATI). They prevailed upon an employee, an elderly bookkeeper, to agree to be listed as the president of ATI on corporate documents. However, Herder and petitioner maintained direct control over ATI's daily operations. The business format engaged in by ATI was identical to that of its predecessor. Petitioner and Herder even continued to use the same printer. They told the printer that if asked about petitioner and Herder, he was to reply that they were merely consultants to ATI and had no other connection with the company.

In time, a number of the recipients of "awards" complained to petitioner and Herder by mail and telephone. Petitioner and Herder ridiculed the complaints and frequently threw them away without responding to them. An employee was told to hang up on people who called and demanded refunds. By early 1983, the Postal Service had stopped delivering mail to ATI.

Thereafter, government investigators examining the bank accounts of USTA and ATI discovered that more than 225,000 checks in the amount of \$14.80 each had been deposited, for a total dollar amount in excess of \$3,325,000. Between July 1982 and March 1983, USTA and ATI disbursed \$1,715,000 to Herder and his mother. Another \$183,000 was paid to petitioner during that period.

2. At trial, petitioner asked the court to compel the government to immunize or to grant judicial immunity to Peter Gayle, whom the defense proposed to call as a defense witness. Petitioner proffered to the court that Gayle would reveal that he and Herder—and not petitioner—devised and implemented the USTA scheme; that Gayle received \$556,000 from the scheme; and that Gayle authored the letter and survey card that was mailed to the public by USTA (10 R. 1202-1205). In response to a proffer by petitioner's co-defendant's counsel, the government confirmed that Gayle had appeared before the grand jury under an agreement that barred the government from using his grand jury testimony against him, but that the informal immunity agreement did not extend to the trial (*id.* at 1213-1215). Gayle was not summoned as a witness for the prosecution.

The court denied petitioner's motion (10 R. 1216). Moreover, the court examined Gayle's grand jury testimony in camera and advised petitioner that the testimony was not exculpatory (*ibid.*).

3. Petitioner alleges that the government's limited immunization of Gayle constituted an abuse of process, which the court was duty-bound to remedy by immunizing the witness at trial. That argument is insubstantial. No violation of petitioner's due process rights resulted from the informal immunity agreement between the government and Gayle in the grand jury proceeding, and the district court was not authorized to grant immunity to Gayle.

This Court never has recognized the existence of judicial authority to immunize defense witnesses absent a request from the government. The federal immunity statute (18 U.S.C. 6003(b)) vests the power to grant immunity in the Executive Branch rather than the Judiciary. The Court accordingly has explained that the authority to immunize witnesses "is peculiarly an executive one, and only the Attorney General or a designated officer of the Department of Justice has authority to grant use immunity." *Pillsbury Co. v. Conboy*, 459 U.S. 248, 261 (1983). See *id.* at 253-254. The corollary of this principle is that "[n]o court has authority to immunize a witness" (*id.* at 261; see *id.* at 262). See also *United States v. Doe*, 465 U.S. 605, 616-617 (1984). Following these principles, the courts of appeals have overwhelmingly ruled that judges may not immunize defense witnesses without a request from the prosecution.²

²See, e.g., *United States v. Whittington*, 783 F.2d 1210, 1219-1220, on rehearing, 786 F.2d 644 (5th Cir. 1986), cert. denied, No. 85-1974 (Oct. 6, 1986); *United States v. Pennell*, 737 F.2d 521, 526-528 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985); *United States v. Gottesman*, 724 F.2d 1517, 1524 (11th Cir. 1984); *United States v. Bounos*, 693 F.2d 38, 39 (7th Cir. 1982); *United States v. Hunter*, 672 F.2d 815, 818 (10th Cir. 1982); *United States v. Karas*, 624 F.2d 500, 505 (4th Cir. 1980), cert. denied, 449 U.S. 1078 (1981); *United States v. Turkish*, 623 F.2d 769, 771-779 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981); *United States v. Graham*, 548 F.2d 1302, 1315 (8th Cir. 1977); *United States v. Caldwell*, 543 F.2d 1333, 1356 n.115 (D.C. Cir. 1974), cert. denied, 423 U.S. 1087 (1976); *United States v. Alessio*, 528 F.2d 1079, 1081-1082 (9th Cir.), cert. denied, 426 U.S. 948 (1976).

Prior to this Court's decisions in *Doe* and *Conboy*, the Third Circuit held that a district court may immunize a defense witness when that witness has essential, exculpatory information that is unavailable from other sources. See *Government of Virgin Islands v. Smith*, 615 F.2d 964 (3d Cir. 1980). Whatever the validity of the Third Circuit's rule, it is applicable by its terms only when the defendant makes "a convincing showing" that the proffered testimony is "both clearly exculpatory and essential to the defendant's case." *Id.* at 972. In addition, "[i]mmunity will be denied if the proffered testimony is found to be * * * cumulative." *Ibid.* The Third Circuit thus has found a judicial grant of immunity appropriate only when there is "a probable certainty that * * * [the] expected testimony would * * * in itself exonerate [the defendant]." *United States v. Lowell*, 649 F.2d 950, 965 (1981) (emphasis in original). See also *United States v. Steele*, 685 F.2d 793, 808, cert. denied, 459 U.S. 908 (1982).

Although the Third Circuit's approach to the issue is different from that of other circuits, there is no need for the Court to address that difference in this case. First, the Third Circuit has yet to determine whether its recognition of judicial immunity survives this Court's remarks in *Doe* and *Conboy*. In light of those intervening decisions, the Third Circuit may reconsider its analysis of the issue of defense witness immunity. Second, petitioner has not demonstrated that he would have obtained a favorable ruling on his request to immunize Gayle even in the Third Circuit. Petitioner failed to show that Gayle would give unambiguous testimony that clearly exculpated petitioner. Indeed, according to the proffer, Gayle was not at all involved in ATI; he ceased his association with Herder before USTA was displaced by ATI. Even if, as petitioner proffered, Gayle helped Herder originate the scheme, realized a substantial profit from it, and authored the survey card and letter

mailed to the public, petitioner remained criminally liable for his knowing and active participation in the fraudulent activity that went far beyond the matters to which Gayle might have testified. Moreover, the district court, which examined Gayle's grand jury testimony, specifically determined that it was not exculpatory (10 R. 1216). In sum, the "[d]ifferences among the circuits are here a strawman because [petitioner] fails all their tests." *Autry v. Estelle*, 706 F.2d 1394, 1401 (5th Cir. 1983), cert. denied, 465 U.S. 1085 (1984).

4. Petitioner claims (Pet. 34-35) that the evidence failed to show that he devised the mail fraud scheme or manifested an intent to defraud third parties. That fact-bound claim does not warrant review by this Court. The government was not required to demonstrate that petitioner helped create the fraud. Its theory of prosecution was that petitioner aided and abetted his co-defendant in executing the illicit scheme (11 R. 1262-1263, 1317, 1323 (prosecution's closing argument)). The jury, properly instructed on aiding and abetting (*id.* at 1334-1336), rejected petitioner's contention that he was an innocent, unaware company employee performing largely ministerial chores for Herder. Among other facts, petitioner's receipt of more than \$180,000 from the scheme in a period of less than a year strongly supports the government's position that petitioner was not just an innocent employee of Herder's. Because the evidence, examined in the light most favorable to the government, adequately supports the jury verdict, petitioner's claim is unpersuasive.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

MAY 1987

